

Exhibit B

THE STATE OF NEW YORK**OFFICE OF COURT ADMINISTRATION**

In the Matter of Charges of Misconduct
and Incompetency

-against-

Report and Recommendation

JOHN PHELPS,

A Principal Court Reporter in the
Unified Court System of the State of
New York, assigned to the Supreme Court,
New York County,

Respondent

FISCH, J H.O.

The instant matter came before me by virtue of Directive 10 of the Hon. George J. Silver, Deputy Chief Administrative Judge of the New York City Courts. That directive dated April 3, 2018 (Petitioner's Exhibit 5) designated me, in my capacity as a Judicial Hearing Officer, to hear the disciplinary charges preferred against the respondent, John Phelps, a Principal Court Reporter in the Unified Court System, assigned to the Superior Court, New York County and to make a report and recommendation, said report and recommendation to then be referred back to Judge Silver for review and decision. A pre-hearing conference was held on June 13, 2018, in an effort to resolve this matter by stipulation of settlement. Such effort was unsuccessful, and hearings were held on December 11 and December 12, 2018. Decision was reserved.

Appearing for Petitioner, the office of Court Administration was John W. Mc Connell, Esq. by Pedro Morales, Esq. Respondent was represented by Clifton Budd and DeMaria LLP by Douglas P. Catalano, Esq. and Eric Allen, President, Association of Surrogate and Supreme Court Reporters. Introduced into evidence at the Hearing were the following Petitioner Exhibits: Notice and Specification of Charge (Exhibit 1); Affidavit of Service of the Charges upon respondent (Exhibit 2); Affidavit of service of the charges upon the union (Exhibit 3); Answer by Respondent (Exhibit 4); Directive appointed me as Hearing Officer (Exhibit 5); the Collective Bargaining Agreement (Exhibit 6); Memorandum of Understanding between the Coalition of Court Reporters Union and the Unified Court System (Petitioner's Exhibit 7); the Unified Court System Ethics (Exhibit 8); Title Standard for Principle Court Reporter (Exhibit 9); Respondent's time cards for the period of September 1, 2016 through March 31, 2018 (Exhibit10); Series of emails transmitted by respondent to Norma Alvarez, an employee of the Court System for the period of October 1, 2016 through June 2017 (Exhibit11); Five court reporter minute agreements prepared by respondent (Exhibit12); Accusatory instrument in criminal proceeding commenced against respondent (Exhibit13); transcript of allocution by respondent at such criminal proceeding on September 24, 2018 (Exhibit14); Certification of Disposition of said criminal proceeding against respondent (Exhibit15).

Petitioner OCA presented its case on December 11, 2018 by calling six (6) witnesses.

Respondent, on December 12, called three (3) witnesses, including respondent Phelps.

Following are the charges preferred against Respondent:

THE CHARGES

You have committed acts of misconduct and incompetency.

Specification No. 1.1

During the eighteen month period preceding the date of these specifications, you have failed to perform the duties and responsibilities of Principal Court Reporter. As a Principal Court Reporter, who is not expected to record and transcribe proceedings on a regular basis, you are primarily responsible for performing the managerial duties of supervising, auditing, and training Senior Court Reporters, which includes monitoring court reporter assignments, overseeing time and leave usage, collecting and reviewing UCS Court Reporter Minute Agreement Forms (MAF), as well as reviewing transcript pages to ensure compliance with applicable regulations. You admitted to the Office of the Inspector General (IGO) that, as a general matter, you assign yourself to record and transcribe proceedings held before referees, and do not perform such managerial or supervisory tasks such as monitoring court reporter courtroom assignments, reviewing court reporter time records, collecting MAFs, or reviewing transcript pages.

Specification No. 1.2

During the eighteen month period preceding the date of these specifications, you have abused your authority as Principal Court Reporter assigned to the Supreme Court, New

York County by cherry picking and assigning to yourself lucrative court reporting assignments. Notwithstanding that the primary function of the Principal Court Reporter title is to be a manager and trainer, you have used that position to repeatedly secure for yourself financially lucrative court reporting assignments entailing the order of a transcript. You admitted to the IGO that you generally sought out and accepted reporting assignments involving matters before referees which entailed, or were expected to entail, the placement of an order for a transcript.

Specification No. 1.3

As an employee of the Unified Court System (UCS), you are required to treat persons with whom you come in contact with patience, courtesy, and respect. On April 18, 2017, you failed to treat other court reporters assigned to the Supreme Court, New York County with patience, courtesy, and respect. On that date, after learning of your decision to assign to yourself a financially lucrative reporting assignment at the Surrogate's Court, several court reporters objected to that decision as undermining the "shape-up" assignment procedure. "Shape-up" is an informal procedure established for court reporters at the Supreme Court, who do not have a regular courtroom part assignment, wherein the participants meet at the inception of the work day to pick on the basis of seniority an assignment from a list of available reporter assignments. You responded to the objection by stating, in sum and substance, that "things are going to change around here," which the court

reporters took to be a threat.

Specification No. 1.4

During the eighteen months preceding the date of these specifications, you have failed to file a UCS Court Reporter Minute Agreement Forms (MAF) documenting an order you received from a private party requesting production of a court transcript. As a court reporter employed by UCS, you are required to prepare an MAF documenting the transcript order and file the MAF with your supervisor within seven calendar days following the preparation of the form. Although you regularly transcribed court proceedings during the preceding eighteen months, you did not prepare and file any MAFs in accordance with the aforementioned requirements.

Specification No. 1.5

You purloined money belonging to other court reporters. During the period of December 2014 through December 2016, the Senior Court Reporters assigned to the Supreme Court, New York County personally and collectively funded a monetary fund, called the Sunshine Fund, to be used to pay for gifts that publicly acknowledged the personal milestone reached by members of the pool, such as the start of a fellow court reporter's assignment to the Supreme Court, the birth of a pool member's child, a pool member's wedding, or passing away. Access to the funds were limited to you and another court

reporter. Since the formation of the fund, you used your access to the Sunshine Funds to make unauthorized withdrawals for your personal use in the total sum of approximately \$3,000. You admitted to the IGO that you withdrew funds from the Sunshine Fund for your personal use.

Specification No. 1.6

You are required to record the time you begin, and the time you end, your work shift on the Kronos Time Management System maintained by the UCS at the Supreme Court, New York County. You failed to record the time you began your work shift on the following dates:

October 13, 2016;	October 14, 2016;	October 17, 2016;
October 20, 2016;	October 21, 2016;	October 25, 2016;
October 26, 2016;	October 27, 2016;	October 31, 2016;
November 1, 2016;	November 4, 2016;	November 7, 2016;
November 9, 2016;	November 10, 2016;	November 14, 2016;
November 15, 2016;	November 17, 2016;	November 18, 2016;
November 21, 2016;	November 22, 2016;	November 28, 2016;
November 29, 2016;	November 30, 2016;	December 2, 2016;
December 5, 2016;	December 6, 2016;	December 8, 2016;
December 9, 2016;	December 12, 2016;	December 14, 2016;
December 15, 2016;	December 16, 2016;	December 17, 2016;

December 19, 2016;	December 20, 2016;	December 21, 2016;
December 22, 2016;	December 23, 2016;	December 28, 2016;
December 30, 2016;	January 4, 2017;	January 5, 2017;
January 6, 2017;	January 9, 2017;	January 10, 2017;
January 11, 2017;	January 12, 2017;	January 13, 2017;
January 17, 2017;	January 18, 2017;	January 19, 2017;
January 20, 2017;	January 23, 2017;	January 24, 2017;
January 25, 2017;	January 26, 2017;	January 31, 2017;
February 1, 2017;	February 3, 2017;	February 7, 2017;
February 10, 2017;	February 14, 2017;	February 15, 2017;
February 16, 2017;	February 17, 2017;	February 23, 2017;
February 24, 2017;	March 3, 2017;	March 6, 2017;
March 7, 2017;	March 9, 2017;	March 10, 2017;
March 15, 2017;	March 20, 2017;	March 21, 2017;
March 22, 2017;	March 23, 2017;	March 24, 2017;
March 27, 2017;	March 28, 2017;	March 29, 2017;
March 30, 2017;	April 3, 2017;	April 4, 2017;
April 6, 2017;	April 7, 2017;	April 11, 2017;
April 13, 2017;	April 20, 2017;	April 21, 2017;
April 24, 2017;	April 25, 2017;	May 4, 2017;
May 5, 2017;	May 8, 2017;	May 9, 2017;

May 10, 2017;	May 18, 2017;	May 19, 2017;
May 22, 2017;	May 23, 2017;	May 24, 2017;
May 25, 2017;	May 30, 2017;	May 31, 2017;
June 1, 2017;	June 2, 2017;	June 6, 2017;
June 7, 2017;	June 12, 2017;	June 15, 2017;
June 16, 2017;	June 19, 2017;	June 20, 2017;
June 21, 2017;	June 22, 2017;	June 23, 2017;
June 27, 2017; and	June 28, 2017.	

Specification No. 1.7

You are required to record the time you begin, and the time you end, your work shift on the Kronos Time Management System maintained by the UCS at the Supreme Court, New York County. You failed to record the time you ended your work shift on the following dates:

October 11, 2016;	October 12, 2016;	October 20, 2016;
October 21, 2016;	October 25, 2016;	October 27, 2016;
October 31, 2016;	November 2, 2016;	November 4, 2016;
November 7, 2016;	November 9, 2016;	November 10, 2016;
November 15, 2016;	November 22, 2016;	December 1, 2016;
December 5, 2016;	December 6, 2016;	December 8, 2016;
December 12, 2016;	December 13, 2016;	December 14, 2016;

December 15, 2016;	December 19, 2016;	December 20, 2016;
December 21, 2016;	December 22, 2016;	December 23, 2016;
December 28, 2016;	December 30, 2016;	January 3, 2017;
January 5, 2017;	January 6, 2017;	January 9, 2017;
January 11, 2017;	January 12, 2017;	January 19, 2017;
January 25, 2017;	January 26, 2017;	February 1, 2017;
February 3, 2017;	February 9, 2017;	February 10, 2017;
February 15, 2017;	February 16, 2017;	February 17, 2017;
February 27, 2017;	March 9, 2017;	March 15, 2017;
March 20, 2017;	March 22, 2017;	March 27, 2017;
March 28, 2017;	March 29, 2017;	March 30, 2017;
April 3, 2017;	April 4, 2017;	April 10, 2017;
April 11, 2017;	April 13, 2017;	April 20, 2017;
April 21, 2017;	April 26, 2017;	April 27, 2017;
April 28, 2017;	May 1, 2017;	May 3, 2017;
May 4, 2017;	May 5, 2017;	May 9, 2017;
May 18, 2017;	May 22, 2017;	May 23, 2017;
May 24, 2017;	June 1, 2017;	June 2, 2017;
June 8, 2017;	June 29, 2017;	June 30, 2017;
July 3, 2017;	July 6, 2017;	July 11, 2017;
July 12, 2017;	July 13, 2017;	July 18, 2017;

July 19, 2017; July 20, 2017; July 24, 2017;
July 26, 2017; July 27, 2017; July 31, 2017;
August 14, 2017; August 15, 2017; August 16, 2017;
August 21, 2017; August 22, 2017; August 23, 2017;
August 24, 2017; August 28, 2017; August 29, 2017;
August 30, 2017; September 1, 2017; September 5, 2017;
September 6, 2017; September 11, 2017; September 18, 2017;
September 19, 2017; September 20, 2017; September 25, 2017;
September 26, 2017; October 5, 2017; October 12, 2017; and
November 2, 2017.

Specification No. 1.8

You made false statements to the Supreme Court, New York County concerning your attendance on the dates listed in Specification No. 1.6, supra. For each of the aforementioned dates, you falsely stated to the Supreme Court, New York County that you had arrived to work at the start of the shift -- but failed to swipe in -- when you actually reported to work after your start time. You admitted to the IGO that during the period covered by Specification No. 1.6, supra, you generally arrived to work late and that your statements to the Supreme Court, New York County indicating that you had arrived to work on time on those dates were false.

PETITIONER'S CASE**CHANA FREDERICKS**

Ms. Fredericks, an employee of OCA for 10 years, is a Senior Court Clerk. She testified that prior to August 2018, she worked at 60 Centre Street, in the court reporter's office as a "Kronos Supervisor" (16) *. She explained that in that capacity she was responsible for keeping time for the court reporters who worked there (10). An additional duty was to collect "minute agreement forms" every three months from the court reporters. Such forms reported the transcripts reporters had to complete for the transcripts provided in the court room (17). Ms. Fredericks, collected such forms from all the reporters, except for John Phelps who "never gave me one" (18) during the five years she worked there. One of Ms. Fredericks duties was to handle request for court reporters, which came from court parts that were not covered for the term. In such cases, the court part would be contacted the day before to inquire whether they needed a court reporter. Ms. Fredericks consulted with Mr. Phelps regarding referee assignments by asking whether he wished to take an assignment before such assignment was listed in the red book (25). Ms. Fredericks testified concerning a request that was made in April 2017 for a court reporter for Surrogates Court. The day before, they called and asked if she had received the information from John Phelps, that they had advised him they needed two reporters. The normal procedure, Ms. Fredericks testified, was for one reporter to be sent and then that reporter would confirm that 2 reporters were actually needed. When she was "adamantly" advised that two reporters were needed, she put the request in the red book where assignments are listed, recording that there would be an "Immediate" for Surrogates Court for a week or so, and that two reporters were needed (27). She then put it on the assignment sheet for the next day (28). Ms. Fredericks testified that she consulted with respondent Phelps about reference assignments, asking him if he wanted the assignment before listing it on the sheet (25). The pay scale for immediate transcripts, Ms. Fredericks testified she assumed was higher (27-28).

*Page reference to Hearing Transcript

Upon cross-examination, Ms. Fredericks repeated her testimony that respondent "never gave" minute agreements to her (30). She was also asked about her testimony on Direct examination, that she only saw respondent, who was the head person in charge of the court reporters, in the office only "sometimes" (21;31). Questioned whether respondent might not have been at another building where he had responsibilities, Ms. Fredericks testified that she only knew he was at another building was when he said, "I am on an assignment" (32). With regard to her assignment as "Kronos Supervisor" (35), she was given a list of people from whom she was to receive such reports. John Phelps's name was on that list (35). At one point he asked that his name be removed from the list, but then relented and told Ms. Fredericks to keep his name on the list (35). She received such forms from everybody else, but never from respondent (36).

"To my knowledge, John Phelps did not
give me one minute agreement form
since I ran the report" (36).

Upon further cross-examination, Ms. Fredericks testified that although referee work was done by all Senior Court Reporters, "he just had the pick of the first referee" (37).

TERRY ANN VOLBERG

Ms. Volberg has been a Senior Court Reporter, for Supreme Court, Civil Division for 30 years, assigned to the Civil Division at 60 Centre Street (39). She described the procedure for selling transcripts, by testifying that when an attorney wishes to purchase a transcript, she will fill out a Court Reporter minute agreement, listing details such as delivery and payment instructions which the attorney will sign. She makes a copy and places the copy in a box in Room 420, the Court Reporter's office (40). On April 18, 2017, she was on Tier 1 and every morning would go to shape-up the Room 420 where people on Tier 1, Tier 2 and Tier 3 would review the assignments sheet and by order of which Tier one was on and Seniority would select the assignments to take for that day (42). As s she was proceeding to shape up, which takes place at 9:15, she and colleagues were commenting on whether Surrogate "immediate"

assignment would appear on the assignment sheet. She explained that such assignments should have been given to Tier 1 because it was an "immediate copy" trial and Tier 1 was supposed to work first (42). Upon arriving at Room 420, she examined the assignment sheets and discovered her name did not appear (43). Before shape up began, she asked Phelps if she could ask a question and when he said she could, she said, "why isn't the Surrogate's Court assignment on the sheet assignments for the day" and Phelps replied, "because I am taking that trial" (43). After an awkward silence that followed, Phelps looked at everyone and said, "why the silence?" (43) and Ms. Volberg replied "Because you are not supposed to be taking immediate copy trials" (43). Phelps responded by saying Volberg didn't know what she was talking about, that he had taken trials and that he and Bonnie Piccerillo when she was chairperson of SCRAP had worked out such arrangement (43). Ms. Volberg said she did not recall such arrangement even though she had been on SCRAP since its inception (44). Phelps asked if Volberg was calling him a liar, and she said she was not, merely said she had no recollection of such an arrangement. Another court reporter who was present, Angela Tolas, asked if that arrangement with Bonnie was in writing and Phelps replied, "I don't put anything in writing" and Angela retorted, saying "I beg to differ with you. You put everything in writing and that's the only way we can contact you is through texting" (45). Others in the room also confronted Phelps. Michelle Panteloukas told Phelps that according to his job duties and job title, "you are rarely if ever, supposed to be in a courtroom". Phelps said "I can make my money however I want to" (46). Phelps and Ms. Volberg accused each other of being combative. At the end of the assignments, Phelps, said that because everybody had a problem with how the assignments were given out, "there is going to be some changes around here". (47). Ms. Volberg asked if that meant there would be retribution and Phelps said, "I didn't threaten you" and the others in the room, in unison, replied "it sounded like a threat to us" (47). When the meeting concluded the reporters looked at each other and decided they should go and talk to Eric Allen, the Union President. They

proceeded to Allen's office, related what had happened and emphasized that in addition to Phelps taking the more lucrative assignment, they were concerned about the threat. Allen told them he could not help them and suggested they go and report these events to administration (49). They did not wish to go to administration, and later that day, Ms. Volberg put everything in writing and left her letter in Allen's office. She never heard anything from him after that (50).

Ms. Volberg expanded on why such assignment was more lucrative, by explaining that immediate copy trial transcript, are paid a premium rate and when one is on reserve, First Reserve is supposed to work first. She concluded her direct testimony as follows:

"John was using his Title for monetary gain

And to put himself above everyone else

In the office' (51).

Upon cross-examination, Ms. Volberg was asked if Phelps attempted to call her and try to make amends. She replied that he telephoned, left a voice message to return his call but because the message said nothing about the purpose of his call, she did not return the call (54-55). Ms. Volberg testified that other supervisors did do referee work, but that was not the issue. She explained the issue was the type of order this was. This was an immediate copy. First Reserve works first and is entitled to that (55).

MICHELLE PANTELOUKAS

Michelle Panteloukas testified that she is a Senior Court Reporter, employed since January 2016 by the Supreme Court, New York Civil Term, and her supervisor since she commenced her employment is John Phelps (59-60). On April 18, 2017 she went to Room 420 for the morning shape-up to review the red book which lists assignments. There was a question about whether there would be an assignment for Surrogates Court, because an assignment had been erased from the red book (60). Terry Ann Volberg spoke out and questioned what had happened to Surrogates Court, and John Phelps said "I'm

taking Surrogates Court" (61). Terry said "since when do you take Surrogate Court? You know the agreement was that you take referees" (61). Phelps got angry and defensive and repeated "Well I'm taking surrogates Courts" (61). He was questioned further and said, "why are you causing problems" and being a "trouble maker". Other reporters also raised questions and Phelps said "I'm the Chief Reporter and I can do whatever I want" (62). Ms. Panteloukas said -- you cannot do whatever you want, there are parameters as to what you can do, and Phelps retorted "I fit within those parameters" (62). Other reporters also raised objections and Ann Toulas said that he was only taking this "because it is an immediate". Phelps replied that if they didn't like the way things are running, "things are going to change around here". This comment caused a big commotion because it was interpreted as a threat (62). Ms., Panteloukas explained that there was a higher page rate for the assignment Phelps was taking for himself. Other reporters there that day included Angela Toulas, Vanessa Miller, Terry Volbeg, Toni Figueroa and Laurie Sacco. Ms. Panteloukas explained the reference to an assignment, which was reached before her time, that was reached with SCRAP, to the effect that Phelps would take referee's assignments but no other key assignments (64). The reporters then reviewed the minutes of all SCRAP meetings and there was nothing in such minutes supporting Phelps claim (64).

Ms. Panteloukas further testified that the reporters questioned Phelps's comment which they all regarded as a threat (64). A group of reporters then went to see Eric Allen where they reported on the incident. Allen told them there was nothing the union could do and suggested they go to administration and speak to Chief Clerk John Werner. Ms. Panteloukas testified that there are 5 groups of reporters, reflecting levels of seniority and each group has two representatives from SCRAP. Each group met and discussed going to Werner to report that Phelps was not doing a good job as a supervisor. After receiving the backing of all the reporters. A meeting was held with Warner at which they described their complaints, including the incident in April 2017. Ms. Panteloukas testified that in May, a month after the

April incident, she and Phelps were sitting at a table, when she was proctoring a court reporter's exam and Phelps spoke to her. He said that in the past there was another chief reporter who used to take a lot of assignments, and a woman who tried to bring charges against him "got fired" (68). She asked why did she get fired and Phelps replied "It is not that hard to fire somebody. All you need is the right paperwork" (68). Ms. Panteloukas interpreted that as meaning "you need to keep your mouth shut or there will be repercussions for speaking out" (68).

Upon cross-examination, Ms. Panteloukas testified that principal court reports have participated in taking copy in the courtroom and that is not improper (69). The usual practice with regards to whether a proceeding is an immediate or daily copy matter is to see whether the sheet identifies the proceeding as such. Also, one reporter goes to the part to confirm that 2 reporters are needed. Ms. Panteloukas was asked whether anybody was retaliated against by Phelps and she replied she was not aware of any situation of retaliation (73). Also, if Phelps had gone to do a referee proceeding, not knowing it was daily copy and the parties or judges requested daily copy, there would be nothing wrong for Phelps to have engaged and continued in that practice. Upon further direct testimony, Ms. Panteloukas testified that "John really was always working and always taking assignments that he could make the most amount of money on". The April 2017 incident was because he was taking one more assignment that should have been given out" (75).

TONI ANN FIGUEROA

Toni Ann Figueroa testified that she is a Senior Court Reporter, currently assigned to Nassau County Court. From July 3, 2003 through November 16, 2017, she worked at Manhattan Supreme Court as Deputy to respondent John Phelps (77). In such capacity, among her other duties, she opened the office at 8:30, checked messages, and prepared the shape-up sheets where reporters were assigned for the following terms, and which Phelps then approved. Shape-up sheets involve Tier 1 reporters who

are not assigned to judges who are given assignments. Other records she handled were minute agreement forms, prepared by reporters which record the name of the case, index-number, whether the transcripts ordered were regular, daily, or expedited, etc. Ms. Figueroa was basically running the office and supervising reporters. During her time as his Deputy, Ms. Panteloukas did not open the main office, did not check messages, did not create the assignment sheets. "From time to time", Mr. Phelps met with reporters, signed off on requests for leave, would appear in the main office and did not spend much time supervising court reporters (82-83). According to Ms. Figueroa, Phelps spent most of his time transcribing court proceedings (83). Mr. Panteloukas only "rarely" submitted minute agreement forms which record court proceedings that were transcribed by court reporters (88). With regard to, referee work, the practice was that when requests for referees arrived from a part, Mr. Phelps was notified first to determine whether he wished to accept the assignment (85). During the period that Ms. Figueroa worked as Deputy to Mr. Phelps, he usually reported to work at 8:45, or 9:00 a.m. and swiped in only "time to time" (88). Ms. Figueroa testified that she was present on April 18, 2017 when an encounter arose between Phelps and court reporters. Earlier that day there was a request for Surrogates Court, involving a daily copy transcript and Phelps asked Ms. Figueroa if she wanted to accept the assignment with him. Mr. Phelps took the assignment for himself and this upset the court reporters. Among those present were Terry Ann Volberg, Michelle Panteloukas and about 10 in total (89). The encounter became "hostile" with Phelps not only saying he was taking the assignment himself but that "things were going to charge" (90). Ms. Figueroa testified that in approximately "2013, she and Phelps created a "Sunshine Fund" for the staff to mark deaths, births, holidays, etc. In early January each year, Phelps would forward an email requesting that reporters donate \$100 to such fund and the majority did so (92). Such donations were deposited and only Ms. Figueroa and Phelps were authorized to make donations. At one point, Ms. Figueroa noticed that there were withdrawals, which

she regarded as unauthorized because they were made in Punta Cana, Hard Rock in Dominican Republic and others in Belleville, New Jersey, where Mr. Phelps lived (93). She spoke to Phelps about this and he said he was going to replace the money (94).

Upon cross-examination, Ms. Figueroa testified that Mr. Phelps told her he would "replenish" the withdrawals from the Sunshine Fund (94).

NORMA ALVAREZ

Norma Alvarez testified that after about 30 years as an employee of OCA, the last 17 years assigned to New York Supreme, she retired in September 20, 2018. Her last title was Court Analyst, assigned to 60 Centre Street. Her duties involved everything related to time and leave, timecards, etc. The time keeping system was known as Kronos. All employees who are overtime eligible are required to swipe in at the commencement of their shift and swipe out at the end of their shift, using their I.D. card specifically assigned to them. If an employee fails to swipe in or out, Ms. Alvarez would forward an email to the employee's supervisor, requesting an explanation and Ms. Alvarez would make an adjustment in the records. Ms. Alvarez testified that she knew Mr. Phelps and that his Kronos Supervisor, who was responsible for approving his time cards, was John Werner, the Chief Clerk. During her testimony, Ms. Alvarez was shown records of Mr. Phelps's timecards for the period of October 2016 through March 2018 (Exhibit 10) and a series of emails forwarded by Mr. Phelps to Ms. Alvarez for the same period of time (Exhibit 11). Such records, as explained by Ms. Alvarez, reflected the multiple occasions respondent failed to swipe in and swipe out. Ms. Alvarez was shown page 16 of Exhibit 10 reflecting 38 listings of Punch Missed Swipe, which meant respondent failed to swipe on those days (106). The emails listed on Exhibit 11 reflect respondent's replies to Ms. Alvarez who sought explanation from him concerning his failure to swipe in or swipe out.

CASMAS GRANT

Casmas Grant testified that he is the supervising investigator at the OCA Inspector General's Office, and in such capacity supervises five investigators. The Inspector General's Office investigates allegations of misconduct against Court employees. When interviewing a witness, the witness is advised that although the interview is confidential, there may come a time when they may have to testify concerning the information provided at such interview.

On June 1, 2017, the Inspector General's Office commenced on investigation concerning allegations that respondent, John Phelps, failed to supervise the reporters at Supreme Court; that he took the most lucrative assignments for himself; and that he made a veiled threat to court reporters on April 18, 2017. As to investigation proceeded, additional allegations arose, that Mr. Phelps failed to complete minute agreement forms; engaged in time and leave abuses; and stole money from a "Sunshine Fund" (118).

Mr. Grant sought and received a box of minute agreement forms for the period 2011 through time Grant requested such forms in 2017. Grant reviewed all such forms, which he estimated were over 400 and did not find any such forms prepared by respondent Phelps (119). On November 13, 2017, Grant interviewed respondent at the Inspector General's Office at 26 Broadway. Also present were an Inspector General trainee, respondent's attorney Catalano and Eric Allen (121). Grant told Phelps that one of the allegations was that he failed his responsibility as Principal Court Reporter to review transcripts to assure they met OCA Standards. Mr. Phelps told Grant he had not reviewed transcripts in at least two years (124). Phelps also said he did not sign off on reporter's Kronos, that someone else did (124). Phelps also said he did not complete the minute agreement form reports; that someone else did (122). Another report he admitted he did not prepare was the 40/90 report regarding reporter's transcripts and the lateness of those reports (122). Another report he did not prepare was the time and

leave reporters report. Mr. Phelps denied the allegation that he was never available for certain administrative duties, claiming he was available and would address issues within 2 business days (123). Phelps acknowledged he was consistently late. He also acknowledges that he was wrong in sending an email to administration reporting that when he did not sign in upon arrival, the in fact he was there at 8:30, his starting time (123). This was not the case, he admitted, stating "it was a mistake on his part to have done so" (123-124). Phelps stated the period of time involved in these erroneous misstatements was 18 months to 3 years (124). Phelps claimed he generally arrived at 8:45, although the information Grant had received from witnesses he interviewed was that Phelps generally arrived after 9 a.m. (124). Mr. Phelps acknowledged that he assigned himself lucrative cases, and that he would not do pro se hearings because those people are most likely not to order transcripts (125). Within regard to the April 18, 2017 incident, Phelps stated that a few days earlier he had been contacted by Surrogated Court requesting a reporter but did not know whether it was an "immediate". Unknown to him, he stated, someone from Surrogates Court had contacted the Court Reporters Office directly and requested a reporter, which someone had written in the red book, which lists requests for reporters and written "Surrogates Court Immediate". Phelps told his staff they should not write "immediate" if they did not know if was "immediate" and he whited that out (120). When he went to the part, he learned it was an "immediate". When he went to shape-up that morning, he was confronted about the Surrogates Court request and voices were raised, and he muttered, "things are going to change around here", underneath his breath, which he meant that he was going to make changes himself (127). Mr. Phelps acknowledged he did not collect and file minute agreement forms, which someone else did and gave to him. He acknowledged he had this box of minute agreement forms from every reporter but none for himself (127-128).

Mr. Phelps was asked about the Sunshine Fund, collected every year for birthdays, holidays, death, etc., and admitted that he used some of that money for personal expenses. He regarded his use of such funds as a loan which he intended to repay (130).

Upon cross-examination was asked whether he regarded the income Mr. Phelps received from transcripts in excess of what other reporters earned and he stated he could not. Mr. Grant, however, noted that during his interviews of referees, they reported that Phelps was in their courtroom for those cases. One such referee related an instance when Mr. Phelps was in courtroom and upon learning that one of the litigants was pro se, Phelps loudly proclaimed, so everyone could hear "I don't do pro se" and left the courtroom (133). In another instance, when he learned the matter was going to be settled, which meant it would not be as lucrative as expected, he left and sent another reporter in his stead (134). With regards to Phelps lateness, Mr. Grant acknowledged that Phelps told him that construction on Worth Street and the Holland Tunnel were making him late (135). Grant, however, stated he did not regard construction as a reason to be late on a regular basis, explaining that if one normally leaves home at 6 a.m. and knows there's construction over a period of years, you leave your home at 5:30 a.m. (139). Mr. Grant acknowledged that Phelps advised him he was experiencing a difficult time in his life with his wife causing him to arrive late on occasions (137).

I find the testimony of Petitioner's witnesses Chanae Fredericks, Terry Ann Volberg, Michelle Panteloukas, Toni Ann Figueroa, Norma Alvarez and Casmos Grant credible, consistent and trustworthy.

RESPONDENT'S CASE

MICHAEL DAUGENTI

Michael Daugenti testified that he was a Senior Court Reporter who worked in Brooklyn and then at 60 Centre Street and had worked with, and then for, the respondent. He was a colleague of respondent until respondent's promotion to Principal Court Reporter, at which point he became Mr. Daugenti's

Supervisor. He testified respondent did shape up in the morning at which time he assigned cases and sometimes also served as a reporter for referees. He knew of no prohibition upon respondent, as Principal Court Reporter, from doing court reporting. He described respondent's reputation as excellent and he had good rapport with the staff as to honesty and fair play.

Upon cross-examination, Mr. Daugenti testified that he would be shocked if respondent took lucrative court reporting assignments for himself before assigning such case to other court reporter and would still affirm respondent's high reputation for truth and honesty even learning of allegation that he had threatened to terminate a reporter who objected to his taking assignments for himself. Likewise, he would still regard his reputation for honesty and truth even in spite of allegations that he took monies belonging to other reporters for his own personal use and even though he pled guilty to petty larceny based upon such allegations, (151-152).

ROSS UPSHAW

Ross Upshaw testified he joined OCA as a court reporter and worked in Criminal and Supreme Court until his retirement in 2010. Mr. Upshaw became a Principal Court Reporter in 1998 and respondent was his subordinate. Respondent was a model court reporter, never the subject of complaints from judges and Principal Court Reporters received excellent evaluation for his performance. Mr. Upshaw testified there was no prohibition upon Principal Court Reporter transcribing, nor any prohibition upon taking daily copy or serving for a referee. A prior Principal Court Reporter, Frank Rizzo, took daily copy and worked all the time (155). Mr. Upshaw testified that when he took trials and daily copy and worked with Special Referees, some members of his staff complained. Upshaw spoke to John Werner, the Chief Clerk who forwarded a memo to all court reporters that Upshaw was entitled to do such work. Mr. Upshaw testified that respondent enjoyed high reputation for honesty and ethical treatment of others, stating "I would give him a 10" (157).

Upon cross-examination, Mr. Upshaw testified he is aware that there is a provision in the title standard issued for Principal Court Reporters that a Principal Court Reporter rarely records and transcribes Proceedings, but Mr. Upshaw pointed out that the language cites "rarely". In his own case he might have taken copy perhaps "a couple of times a week. Some weeks no, some weeks yes". Mr. Upshaw noted that what the Chief Clerk was concerned about was that the office ran smoothly and that if he took a daily copy proceeding, nothing was lacking with regard to the proficiency of the office (161).

Mr. Upshaw was questioned further about his high regard for respondent's reputation for honesty, fair dealing and ethical treatment of others. If he knows that it was alleged that Phelps had taken advantage of his position to assign to himself financially lucrative court reporting assignments, Upshaw testified he would not still maintain his opinion of Phelps's reputation for honesty, fair dealing and ethical treatment of others (162). Likewise, if it was proven that respondent appropriated for his own use monies belonging to other court reporters, Upshaw would not stand by respondent's reputation for honesty, etc. (163).

JOHN PHELPS

John Phelps testified that he began his career working for freelance agencies, then went to work for Worker's Compensation in 1987 -1989. He worked provisionally at 100 Centre Street and in 1998 passed the test for Senior Court Reporter and was hired on December 24, 1998 as a Senior Court Reporter. Mr. Phelps testified that he was never subject to any complaint, disciplinary action during his 20 years of service (166). Mr. Phelps has taken advanced courses and is a certified real-time reporter, a system permitting, by the use of laptops, to follow proceedings simultaneously as they proceed. Mr. Phelps trained colleagues on setting up such systems to assist hearing – impaired jurors and attorneys (167). Phelps also received a Commendation from OCA for assistance in creating the new Court Reporting Manual.

Introduced into evidence as Exhibit A and B were receipts with Phelps credit card number, attesting to Mr. Phelps using his credit card for Sunshine Fund gift payments to court Monica Martinez and Michelle Panteloukas. (170-171).

In March 2011, Mr. Phelps applied for the position of Principal Court Reporter at 60 Centre Street and received such appointment.

As Principal Court Reporter, Mr. Phelps's duties are to assure that all parts are covered with staff, time keep, make sure to Kronos time cards are correct and, as necessary, audit transcripts (173). Mr. Phelps testified he supervises four buildings: 60 Centre St; 80 Centre St.; 111 Centre Street; 71 Thomas Street. There was never a complaint about his not performing his duties of supervising those buildings.

Mr. Phelps testified that as Principal Court Reporter, it is his responsibility to collect minutes agreement from his staff and create a report, the "Minute Agreement Form Summary Report", which he submits, quarterly to John Werner, formerly Judge Fein Fisher and now Judge George Silver. Mr. Phelps explained that his responsibility was to submit such quarterly reports and that he was not required to execute his own personal agreement forms, even though John Werner knew he was working with referees and had received permission to do so (178). Mr. P testified he submitted such reports every 3 months and was never late in doing so. Mr. Phelps testified he was at shape-up every day at 9:15 to give out assignment. Phelps described the red book, which is a yearly diary, into which assignments are recorded. Mr. Phelps described the April 18, 2017 incident as follows:

He received on email from the Clerk at Surrogates Court that a reporter was needed on a particular date and nothing was said about whether it was immediate or daily, and that it would last for 2 weeks (180). A few days later, he looked in the book and it contained the name of the case and "immediate" with a question mark. Phelps asked Matt why he wrote "immediate" with a question mark,

and he said to make a note to myself that it might be immediate. I told him you're re not supposed to do that because it will start an uproar because we don't know yet that it is an immediate until a reporter goes to the part and calls in that it is an immediate or daily copy. That's why I whited it out. If 2 reporters who expect to get on a daily, go to the part and the case is settled, they will come back and complain why did you send me out. I missed out on another care because I went to this one (182). The assignment technically should have gone to Tier 2, but I took the assignment. Mr. Phelps was confronted with the testimony of Terry Volberg that this case should have gone to a Tier 1 reserve part employee and testified that that was not true. Because it was not confirmed that it was an immediate copy it was just a regular jury trail. The policy, Phelps testified, was that Jury trials go to Tier2. If a Tier 2 reporter went to the Part and learned it was a daily or immediate, that Tier 2 person would remain there and would call it in. Someone from Tier 1 would be sent to help (183).

With regards to testimony that he worked excessively in the courtroom, Mr. Phelps testified that he had a total of 28 days of copy for the entire 2017 year. Phelps stated he worked on average of five days a month in courtrooms taking copy (185).

From the day he began his job in 2011, he had numerous discussions with SCRAP regarding what type of cases he would take. He was the new supervisor and they wanted to know what he was going to do. "I wanted a happy staff". He told them he would take referees, and perhaps a Surrogate Court case, and if there were a court ordered deposition, he would take it. But he promised "I would never, ever take dailies from Tier 1", and Phelps testified he never did, and he kept that promise (187). Mr. Phelps denied he took a daily copy from Ms. Volberg or anyone else who was on Tier 1 on April 18, 2017 (187). He testified when he went there and confirmed that it was an immediate, he followed the procedure of calling the office and Vanessa Miller, on Tier 1, helped him on the job on that case (187).

Mr. Phelps received his position on April 14, 2011 and on April 15, 2011 wrote to Chief Clerk, John Werner, inquiring whether there was any problem with him working in a part with a judge on a daily copy or with a referee, noting that "Ross and Mary did it". This email, together with Werner's response "No problem, John Thank You for asking" were received in evidence.

Mr. Phelps testified that the case he took on April 18 was the only daily copy case he did since 2015 (189) despite the fact that he had permission from John Werner (189).

Continuing with regard to the April 18, 2017 incident, Phelps testified that as soon as he entered the room, Terry Volberg asked "John, what happened to the Surrogate's Court assignment" and he replied, "I took it". Terry continued, saying who knew you were taking it, and asked "Did anybody know John was taking that?" (190). Phelps asked Volberg if they could first continue with the assignments and he would then go to his office and he would explain it. She refused to hear it, continued asking whether anyone know Phelps was taking it and the staff was shaking their head. Although, according to Phelps's testimony, he had mentioned at the 9 a.m. SCRAP meeting they had that he might do it, this was only the first time he did it. Terry Volberg continued, saying you told us you were never going to take a jury trial, and Phelps said he never said that. Terry Volberg continued, insisting that he had said that (190). The atmosphere now was getting "combative" (191). Phelps told them that although as supervisor he could take what he wanted, he doesn't because he wants to work with them. Then Michelle Panteloukas said that the description said the Principal Court Reporter is rarely in the courtroom and rarely takes jobs. Phelps replied it says "rarely" not "never" but no one was willing to listen and then Phelps said, "Things are going to change anyway" and Terry heard that and jumped up and said "What? You are going to be retaliatory?" Phelps replied he was going to be retaliatory, and what was going to change was him and what jobs he would take. He said that although he had not taken certain jobs, now he would. Volberg got mad, upset, turned red and was huffing (193). Then silence, and Phelps gave out the

assignments, after which they "stormed out" (193).

Following this incident, Phelps received a call from Eric Allen who told him they met with him and were very upset, and suggested he call a meeting. Phelps said he would. Phelps never had a chance to call a meeting because he met Vanessa Miller, who was in the room on April 18, and he told her not to worry about what he said and to believe him that she had nothing to worry about and she nodded yes. He then called Terry, left her a message to call him, (194) which she never did. Phelps testified he never threatened anyone, never intended to, never retaliated against anyone (194). Phelps then testified about personal problems he was experiencing with his wife, and never had any problems with attendance or lateness during his 20 years of court service.

The Sunshine Fund was used every year during Christmas time to buy baskets for the building, for gifts if someone had a baby, retirement party, etc. He told Toni Figueroa, with whom he created the fund, on occasions that he might borrow money from the account but would put it back and she said it was okay, no problem (198). As time went on, he took money out but replaced such withdrawals with cash, and on occasion used his credit cards. There came a time when the District Attorney did an investigation and charged him with a misdemeanor for petty larceny. He made restitution and performed 10 days of community services

Phelps testified that with regard to the time cards introduced into evidence, that when he failed to swipe in or out, he would notify Norma Alvarez and she adjusted the time (201). There were other occasions, he admitted that he was late.

Upon cross-examination, Mr. Phelps conceded that the commendation he received for the Court Reporter's Manual was for his work as part of a committee which worked on the manual (206). Phelps was confronted with his testimony that as a Municipal Court Reporter he was not required to submit minute agreement forms for his transcribing court proceedings but merely a quarterly summary. He

agreed that a court reporter was required to submit a minute agreement form created for the purpose of documenting a transcription order but claimed such requirement did not apply to him as Principal Court Reporter. He was then shown Exhibit 7 which describe such requirements and admitted that there was no exception to this requirement for Principal Court Reporters, but stated although there was no written exception, it was his understanding that he was exempt because "I was never asked to hand in mine (210-211). Phelps further testified he did fill out such forms but retained them (211-212) together with those of the entire staff. Phelps was confronted with the testimony of Inspector General's investigator Grant that he obtained all minute agreement forms of court reporters from the main office and the box contained about 600 forms but there were none submitted by Phelps, who subsequently, gave Grant 5 such forms (213). The forms Grant collected were for the period 2011 through 2017 and Phelps was asked whether that meant he only had 5 cases where a request was made for a transcript. Phelps was reminded of his earlier testimony that he retained other reporters' forms in the event they were needed for an audit but expected he would not be audited so he didn't keep them. During further cross examination, Phelps was shown the Title Standard which reads "A Principal Court Reporter rarely records and transcribes proceedings". Phelps admitted he was aware of that Provision. He was shown Exhibit 6, the email from Chief Clerk Werner in 2011 when he become Principal Court Reporter, which replied to Phelps' question about his being able to work in the parts and noted that while he was granted permission to work the parts, such email never eliminated the "rarely" transcribing requirements (218).

Phelps was asked about his Financial Disclosure forms, required annually of all OCA employees, which disclosed income of \$20,000 for 2014; \$60,000 for year 2016 and questioned whether such income was consistent with the "rarely" restriction on Principal Court Reporters transcribing court proceedings. He stated he disagreed that such income was inconsistent with the prohibition (219-220).

Phelps agreed that there were occasions where he did not accept pro se referee assignments, but stated it was not because it was unlikely that there would be an order for a transcript. In such cases, he testified his time would be better devoted to returning to his office and doing administrative duties. Likewise, that was his explanation of rejecting cases where there was a settlement and denying the testimony that he would leave the courtroom upon learning that a case was being settled (222).

With regard to the April 2017 incident, Phelps testified he heard Chanae Fredericks testify that she had confirmed that the order from Surrogate's Court was for an "immediate" (223-224), and that when he proceeded to Surrogates Court, he confirmed it was an "immediate" (224). With regard to the "Sunshine Fund", Phelps testified that he repaid moneys he had withdrawn from the very beginning, citing one example where he withdrew \$300 on Tuesday and replaced it the next day which was payday (225). Once the account closed because of lack of funds, he used his credit card to purchase gifts for court reporters who were commemorating events (225) but did not tell them such gifts were repayment into the Sunshine Fund (225). Mr. Phelps concurred that he told the Inspector General Investigator Grant that he was late to Supreme Court but did not agree that he said such lateness was on a "regular basis" (228). When one fails to swipe in or out, the employee calls Norma Alvarez and explains the reason and if such explanation is reasonable and accepted, the lateness is excused (227). Phelps was shown the time cards introduced into evidence at the Hearing and concurred that none of those dates were excused (227). Phelps also concurred that even where Ms. Alvarez made adjustments to reflect times Phelps failed to swipe in or out, such adjustments did not excuse his failure to do so (229).

I find the testimony of the character witnesses Michael Daugenti and Ross Upshaw credible.

With regards to John Phelps, in my "Analysis" section, I specifically identify such portions of Phelps testimony which I find credible, and likewise those areas of his testimony I reject as not credible.

ANALYSIS

Following the Hearing, the parties submitted briefs listing the charges and specifications, quoting Hearing Testimony and citing legal authority purporting to support their positions.

As accurately Summarized in Petitioner's brief, Principal Court Reporter Phelps is charged with (1) failing to perform his managerial duties (2) abusing his position by assigning lucrative reporting assignments to himself (3) threatening his subordinate court reporters (4) failing to produce minute agreement forms (5) purloining money belonging to other court reporters (6) failing to record the start and end of his work shift (7) making false statements that he had to work on time.

An examination of such charges follows:

Failing to perform his managerial duties

The duties of Principal Court Reporter are prescribed in the Title Standard (Exhibit 9) and states that such officer is "responsible for supervising and auditing the activities of Senior Court Reporters" by making court reporting assignments, reviewing transcripts produced by court reporters for correctness of forms, training new Senior Court Reporters, maintaining office records such as calendars and notebooks, preparing periodic reports of court reporter activities, recording the attendance of court reporters, and hiring per diem court reporters".

The standard directs that a Principal Court Reporter "rarely records or transcribes proceedings". Toni Figueroa was designated unofficial Deputy Principal Court Reporter by respondent in 2011. She testified that in such capacity she basically ran the Main Office and Supervised court reporters. Specifically, she opened the office at 8:30 a.m.; checked phone messages; prepared the shape-up sheets where reporters were assigned for the following terms and which Phelps then approved. She also handled minute agreement forms prepared by reporters. She testified that Phelps did not open the Main Office, did not check messages, did not create the assignment sheets. It was only "from time to

time" the Phelps, met with reporters signed off on requests for leave, or would appear in the main office. According to Ms. Figueroa, Phelps spent much of his time transcribing court proceedings (83). He usually reported to work at 8:45 or 9 a.m., only swiped in "from time to time" and "rarely" submitted minute agreement forms. Chanae Fredericks testified that she only saw Phelps; in the office "sometimes", and that it was Ms. Figueroa that court reporters spoke to about assignments (18-21). Respondent in his brief addressing the testimony of several court reporters concerning Phelps devoting predominately most of his time to courtroom work, argues that such work was not to the dereliction of his other duties.

One of the character witnesses who testified in behalf of Phelps was Michael Daugenti. When asked to describe Phelps work performed as Principal Court Reporters during Daugenti's service as a subordinate, Daugenti testified:

" He did shape-up in the morning to give out the jobs.

Then sometimes he would cover the referees. That was his

Assignment" (147).

Cosmos Grant, the Supervising investigator for the Inspector General's Office, interviewed Mr. Phelps on November 13, 2017. During such interview, Phelps was asked about the responsibility of a Principal Court Reporter to review transcripts to assure they met OCA Standards. Mr. Grant testified that Phelps stated he had not reviewed transcripts for at least two years; that he did not sign off on reported Kronos; that he did not complete the minute agreement forms; that he did not prepare the 40/90 report regarding reporter's transcripts and the lateness of such reports; did not prepare the time and leave reports (121-4); did not make court reporter assignment.

Phelps testified that he supervises four buildings and that there was never a complaint about his not performing his duties of supervising those building. He described his duties as assuring that all parts

are covered; time keep; assure that time cards are correct and as necessary, audit transcripts.

In addition to Ms. Daugent's description of the limited work Phelps performed, Respondent himself when asked by his attorney to describe whether he performed his duties on a daily basis, or otherwise, testified;

"Daily, I was at shape-up every day, 9:15 sharp, to give out the assignments".

Respondent's effort to rebut Petitioner's evidence of Phelps' flagrant dereliction of duty and his gross failure to perform his required responsibilities, is woefully inadequate.

Ample legal authority exists supporting an employee's termination for unsatisfactory work performance.

In Matter of O'Neil v. DeSantis 49 AD2d924 (1972) the Chief Building Inspector of the City of Troy was terminated for failure to enforce the building code and unsatisfactory performance of duty. In Matter of Gimmelli v Reid a Senior Stenographer in Rosseloer County Department of Health was dismissed for failure to perform certain stenographic duties. 74 AD2d 694 (1980) See also Precida v Grinker 154 AD2d 290 (1989).

Abusing his position by assigning lucrative reporting assignments to himself

Phelps was appointed Principal Court Reporter on April 4, 2011. On April 15 he wrote to Chief Clerk John Werner inquiring whether he could work in a Part with a Judge on a daily copy or with a referee, noting that other predecessors had done it. Werner responded saying "no problem". Notwithstanding such approval. Phelps acknowledged at the Hearing that the Title Standard for Principal Court Reporters (Exhibit 9) directs that a Principal Court Reporter "rarely" records or transcribes proceedings". This proscription was recognized by Phelps staff of court reporters who reminded him of such restriction. Ms. Panteloukas, at the April 2017 incident, told Phelps "You are rarely, if ever, supposed to be in a courtroom". Ms. Volberg also testified about the April event that while she

recognized that other supervisors did referee work, this was Surrogates Court work and that the issue was that the assignment was for "immediate" copy? Which involved a higher rate of pay, and First Reserve works first and was entitled to that. As a Tier 1 court reporters, Ms. Volker had priority of selection and could take the assignment for herself. Furthermore, because she was Tier 1, she should have been listed on the assignment sheet, but her name was not there. Ms. Pantelouskas testified that "John was really always working and always taking assignments that he could make the most amount of money on" (). Ms. Volberg put it another way: "John was using his title for monetary gain and would put himself above everyone else in the office".

The April 2017 incident was but one example of usurping assignments which should have gone to other reporters because of seniority but which Phelps selected for himself because they were most lucrative.

Court reporters who transcribe proceedings are paid for such transcriptions and the rate per page is higher when the attorney ordering such transcript requests that copies be provided sooner than the normal time prescribed. "Daily" and "immediate" copy transcriptions earn premium rates and hence are more lucrative assignments. On the other hand, when a litigant is not represented by an attorney, the one who would pay for the transcripts, but is proceeding "pro se", such litigants generally, do not order transcripts. At his interview with Inspector General investigator Grant, Phelps acknowledged he assigned to himself lucrative cases and that he would not accept "pro se" cases because it is "most likely that pro se litigants would not order transcripts (2017). Grant interviewed a number of referees regarding such practice.

One referee advised Grant for an incident that Phelps was in her courtroom and upon learning that the litigant was "pro se", loudly proclaimed so everyone could hear: "I don't do pro se" and left the courtroom (133). Another referee reported an incident where Phelps, upon learning that the case was

going to be settled, which meant a less lucrative assignment, left the courtroom and sent another reporter instead.

As noted earlier, Phelps was granted approval by John Werner to do referee cases. Phelps then arranged with Ms. Fredericks, whose duties included accepting requests from Parts for reporters, that before referee assignments were listed in the red book, Phelps was offered such assignments first, describing the policy "He just had the pick of the referee" (37).

When Phelps testified at the Hearing, he stated that the April 2017 proceeding was the only daily copy proceeding he took since 2015. While acknowledging there were occasions, he did not accept pro se cases, he testified it was not because no transcript would be ordered, but rather that he felt his time was better spent returning to the office and performing his administrative duties.

In Its Post-Hearing memorandum, Respondent quotes Phelps testimony that there "never" was a complaint [from Senior Court Reports] with him taking referees" (188). Such statement is contradicted by the Hearing testimony from reporters, cited supra, as well as their meeting with Union President, Eric Allen complaining about his usurping cases that should have gone to another reporter, but keeping them himself.

Returning to April 2017 Incident, Phelps testified he never took daily from Tier 1, and when he confirmed at Surrogates Court when he went there that it was immediate, he called the office and Vanessa Miller who was Tier 1, helped him on the case.

Threatening his Subordinate Court Reporters

On April 18, 2017, an incident occurred in the Main Office which involved a request from Surrogates Court for court reporters. The day before, such request was received and entered in the red book which records assignments. The usual practice was to send one reporter, who upon arriving in Surrogates Court, would confirm the need for two reporters, and then the additional reporter would go

there. Ms. Fredericks testified that the caller from Surrogates Court "adamantly" insisted that two reporters were required and that such assignment was for "immediate" transcripts which earned a higher pay note and would continue for a week or so. Ms. Volberg testified that when she arrived at Room 420 on April 18, 2017, she and other court reporter colleagues examined the assignment sheet and noticed the Surrogate Court assignment, which should have gone to her because she was on Tier 1, was not listed. Before the start of the shape-up (when assignments are dispensed) she asked Phelps if she could ask a question, and when given approval to do so, she asked why the Surrogated Court assignment was not listed for that day. Phelps replied, "because I am taking that trial". Ms. Volberg told him he was not entitled to take immediate copy trials and he responded that he was, citing a purported agreement he had reached with a prior SCRAP Chairperson. There then began a series of heated exchanges between Phelps, and other court reporters who challenged his claim of an agreement and insisting he had no right to take that assignment himself. Phelps then stated that because everyone in the room had a problem with him taking that assignment "there is going to be some changes around here". Volberg asked if he was threatening her and he said he didn't threaten her, to which the other reporters, in unison retorted "It sounded like a threat to us" (47). Other reporters who were present that day included Michelle Panteloukas, Toni Figueroa, Angela Toulas, Vanessa Miller and Laurie Sacco and all regarded Phelps statement as a threat.

Michelle Panteloukas testified that about a month after the April 2017 incident, she and Phelps were sitting at a table when she was proctoring a court reporters' exam and Phelps spoke to her. He told her of an alleged incident in the past where a court reporter "got fired" when she challenged the right of another Chief Reporter who was taking too many assignments. When Ms. Panteloukas asked why that person "got fired", Phelps replied "It is not that hard to fire somebody. All you need is the right paperwork" (68). Ms. Panteloukas interrupted that comment to mean that she should keep her mouth

shut or there will be repercussions.

When Phelps was asked about the April 2017 incident at the Hearing, he testified that what he muttered was what jobs he would thereafter take for himself. He telephoned Ms. Volberg and left a message for her to call back but she never did. He also told Vanessa Miller who was present at the April event, that she did not have to worry about the remark he made about things going to change and she nodded yes.

In its brief, respondent argues that there was no threat and quotes Ms. Volkers testimony that the reporters who went to see Werner regarded "the bureaucratic assignment as the big issue". Moreover, respondent argues, the fact that OCA took no action against Phelps, such as counseling, suspension or any disciplinary action confirms that there was not threat. Furthermore, there is no claim that anyone had been retaliated against by Phelps after the April meeting. The specification that Phelps did not exhibit "patience, courtesy and respect" is therefore meritless.

Respondents attempt to portray Phelps's remark to his staff at the April 2017 meeting as anything other than a threat and an effort to intimidate court reporters against challenging his authority is clearly not credible. His unsolicited comment a month later to Ms. Panteloukas about how easy it is to fire an employee strongly support such finding. It is worth noting his boastful and loud comment to a referee that he doesn't do pro se work, and storming out of the courtroom further characterizes respondent as a supervisor who feels he can do whatever he wishes.

For action not unlike those of Phelps in this case, a Senior typist for Tioga County was dismissed for creating a "hostile, intimidating, disruptive and uncomfortable work environment", making threatening and intimidating comments to other workers and for making threats of retaliation if anyone spoke out. Matter of Sindoni v. County of Tioga 67AD3d 1183 (2009) cited approvingly, see also Mancini v. New York City Housing Authority 12G AD 3d 426 (2015)

Failure to Produce Minute Agreement Forms

Exhibit 7, introduced at the Hearing was the Memorandum of Understanding Between Coalition of Court Reporters Union and the Unified Court System. That memorandum reads in pertinent part, as follows:

"Each court reporter who furnishes a transcript of a court proceeding shall, at the time the transcript is requested, enter into a written agreement for its production with the person or party requesting the transcript."

Such forms, known as the Minute Agreement Forms, (MAF) record the rate per page, estimated date by which the transcript is to be produced and such forms are then required to be filed with the court reporter's supervisor within seven days. It is undisputed that Phelps transcribed court proceedings and accordingly, was required to execute and file such minute agreement forms. Deputy Principal Court Reporter, Toni Ann Figueroa testified that Phelps only "rarely" submitted such forms (84). Chanea Fredericks, a Senior Court Reporter testified that she worked at the Main Office at 60 Centre Street as "Kronos Supervisor" and was responsible for keeping time for the reporters who worked there and also had the duty of collecting minute agreement forms every three months from court reporters. She collected such forms from all reporter, except for John Phelps, who "never gave me one" during the five years she worked there (18;30). At one point, Phelps requested that his name be removed from the list of reporters required to submit such reports, but then relented and told her to keep his name on the list. She received such forms from everybody else but not Phelps and repeated, upon cross-examination.

"To my Knowledge John Phelps did not

Give me one-minute agreement from since

I ran the report" (36).

Cosmas Grant, supervising investigator for the Inspector General's office, investigated the allegations against Phelps. With regard to Phelps failure to execute minute agreement form, Grant sought and received a box containing such forms for the period 2011 through the time in 2017 of Grant's request. There were, Grant estimated, over 400 forms and none submitted by Phelps (119). During his interview by Grant on November 13, 2017, Phelps informed Grant that he did not complete such forms and that someone else did (122). He acknowledged he had a box of minute agreement forms from every reporter but none for himself (127-128). When he appeared at the hearing, Phelps testified that although he was required to collect such forms from all court reporters, he was not required to complete his own, even though Chief Clerk John Werner knew he was working with referees. His responsibility, he testified, was to submit quarterly summary reports, summarizing the forms submitted by the court reporters, and that he did so regularly. Upon cross-examination, Phelps was shown Exhibit 7 and while acknowledging that such document required that court reporters submit a minute agreement form, he repeated his assertion that such requirement did not apply to him. He conceded that there was no written exception applicable to him, but insisted he was exempt because "I was never asked to hand in mine" (210). He testified he did complete such forms but never submitted them but rather retained them with those of the entire staff, in the event of an audit. After his interview, Phelps submitted 5 such forms to Grant, which he received from the union.

In his Post-Hearing brief, respondent challenges this specification by stating the OCA had failed to refer to any proceeding or court appearance in which Phelps participated where he did not execute a minute agreement form. In referring to the testimony of Ms. Fredericks that she had never received such forms from Phelps. Respondent's brief notes that there was another reporter who worked in the

Main Office, Matthew Sedaca and it is "obvious" that Mr. Sedaca "might have" collected such forms from Phelps. Respondent's brief also notes that Inspector General acknowledged receiving 5 such forms from the union and therefore concluded this proves Phelps completed such forms and the fact that they did not appear in the same "box" containing all the others, demonstrates OCA's failure to prove Phelps guilty of such charges.

Purloining money belonging to other court reporters

In 2013, respondent and Toni Figueroa created a "Sunshine Fund" to which court reporters contributed annually. The purpose of such fund was to pay for gifts to court reporters commemorating significant events such as births, wedding, deaths, etc. The money contributed to such fund was placed in a back account and only Phelps and Figueroa were authorized to make deposits and withdrawals. There came a time when Ms. Figueroa became aware of unauthorized withdrawals and questioned Phelps about that. He advised her that money he had withdrawn were basically "loans" because of personal expenses he had and that he would replace such withdrawals. Phelps cites an example of a withdrawal he made on a Tuesday which he replaced the next day, which was a payday. There exists no dispute that Phelps used the money he withdrew to pay personal debt. In two instances, Mr. Phelps used his personal credit card to purchase gifts for two court reporters and regarded such purchases as the equivalent of a reimbursement to the Sunshine Fund. The District Attorney of New York County became aware of such activity and commenced an investigation and charged respondent with a criminal offense. Phelps ultimately pled guilty to a reduced charge, made restitution and performed Community Service.

I accept as credible, respondent's testimony that such Fund was established in good faith and that whatever monies he withdrew were regarded as temporary loans which he intended to repay. Nevertheless, his conviction of a criminal offense represents a violation of the Rules of the Chief Judge

which provide that employees are required to respect and comply with the law. 22 NYCRR § 501 (1)A

Failing to record the start and end of his work shift

Norma Alvarez was responsible for managing the time records maintained for court employees assigned to Supreme Court Civil Term. Such employees, including Phelps, are required to record their arrival and departure times using a "swipe" card. When the system records an employee's failure to swipe in, upon arrival, or swipe out when his/her shift ends, Ms. Alvarez contacts the employee requesting a written statement reporting the time and date such employee arrived or left work.

Phelps's emails to Ms. Alvarez for the period October 17, 2016 through June 12, 2017 acknowledged he failed to swipe in at the 8:30 a.m. start of his shift on 118 occasions and failed to swipe out on 71 occasions. (Exhibit 11). For the period April 26, 2017 through May 4, 2017 and June 29, 2017 through November 2, 2017, Phelps time sheets revealed 43 "missed swipes" indicating he failed to swipe out at the end of his work shift on 43 occasions.

Mr. Grant testified that Phelps, at his interview, admitted he was consistently late and claimed that construction work on Worth Street and at the Holland Tunnel were the reasons. He was shown the time cards introduced at the hearing and concurred that none of those dates were excused. He also conceded that where Ms. Alvarez made adjustments to reflect times and failure to swipe in or out, such adjustments did not excuse his failure to do so.

Respondent's Post-Hearing brief argues that OCA's approved system for dealing with such "swipe in" and "swipe out" failures insures that employees have their time and pay accurately accounted for. Because there is no suggestion, that Phelps did not receive his pay on those swipe failures, Respondent argues, no discipline is warranted.

OCA's failure to dock Phelps pay on the multiple occasions he failed to swipe in or out, is beyond the preview of this hearing, other than, to find it represents no excuse for Phelps behavior.

Making false statements that he had reported to work on time

Toni Figueroa was appointed by respondent as his deputy Principal Court Clerk. During the period July 3, 2003, through November 16, 2017. Ms. Figueroa basically ran the office. She opened the office at 8:30, checked mail and messages and performed all the duties which, are the responsibility of a Principal Court Clerk.

Ms. Figueroa testified that Phelps reported to work at 8:45 or 9 a.m. Phelps, however, advised Ms. Alvarez in writing, that he arrived at work at 8:30. This was not true. In addition to advising Mr. Grant that he was consistently late, Phelps admitted to Mr. Grant that he was wrong in reporting to Ms. Alvarez that he had arrived at work at 8:30. Such "misstatements" involved a period of 18 months to 3 years (Exhibit 10).

In Matter of Lomad v. Kelly an employee of the New York City Police Department was terminated for making false and misleading statements, a similar result was reported in another case 2005 WL6119709 because among other charges the employee made false statements that he was on scheduled vacation for an overtime detail when he was not. Likewise Matter of Kurot v. East Rockaway Fire Department 61 AD 3d 760 (2009)

CONCLUSION

The standard of proof in this proceeding is "substantial evidence" defined by the Court of Appeals as "a minimal standard" requiring less than clear and convincing evidence and less than a preponderance of evidence. 300 Gramatan Ave. Assoc. v State Division of Human Rights 45 NY2d 176 (1978), FMC Corporation v. Unmack et al 92 NY2d 179. Disciplinary proceedings such as these all governed by the Rules of the Chief Judge (section 25.29) as prescribed in the Civil Service Law, Section 75.

Petitioner, in its Post-Hearing Brief, cites numerous legal cases, some of which are cited in my "Analysis" section. Respondent, in its memorandum, argues that labor-management arbitrators have repeatedly held that notice should be given to employees that an alleged violation of a work rule will result in discipline and that OCA cannot discipline Phelps "without any notice to Mr. Phelps that he should not engage in the conduct now complained of " (Respondent p.22). At Oral Argument Respondent's attorney was asked the purpose of advance notice:

"....is the notice.....to make sure that the

Employee knows that such conduct is not appropriate?

Mr. CATALANO: Yes" (283)

Respondent's Post-Hearing Memorandum concludes with a section titled "Mr. Phelps's Tenure" in which it is contended that Mr. Phelps 20 years of OCA Service should be "considered strongly".

I agree.

In recognition of Mr. Phelps 20 years of OCA service, can one fairly argue that he was ignorant of the fact that a supervisor, indeed any employee, should not appropriate money donated by employees for the benefit of other employees and not taken for his personal benefit? Would any Supervisor fail to regard threatening subordinates as "inappropriate conduct"? Was Phelps not aware of the requirement during his 20 years of service that he had to swipe in at the commencement of his work shift and swipe out at its conclusion? Was Phelps unaware ---- and in need of advance notice --- that he should not submit false information concerning when he reported to work?

Mr. Phelps current and prior positions should likewise be addressed in similar context.

Mr. Phelps was hired as Senior Court Reporter in December 1998 and promoted to Principal Court Reporter in March 2011. He was thus very well aware of the duties, responsibilities and expectations of both positions. As Senior Court Reporter he knew that the income of such employees depended upon court reporting assignments and what type of transcripts was expected. He knew the established rule of honoring Seniority in making fair and honest work assignment and not usurping such opportunities for his own benefit and advantage. He knew the job requirement of Principal Court Reporter but rather than diligently and faithfully discharging such mandated performance, chose instead to delegate such work and responsibility to an unofficial "Deputy". Yes, Mr. Phelps 20 years of OCA service has to be "considered strongly".

Based upon the evidence presented to me, and in conformity with well-established law, I find respondent Phelps guilty of all the specifications and charges instituted against him. Such evidence is overwhelming and consists, inter alia, of credible and often undisputed testimony from OCA employees including a number of court reporters who worked under him; admissions Phelps himself made during his Hearing testimony; admissions Phelps made to Inspector General Investigator Grant; information from Referees cited by Grant reporting their experiences with Phelps; testimony from Phelps character witnesses; Exhibits introduced into evidence at the Hearing; and controlling legal authority.

RECOMMENDATION

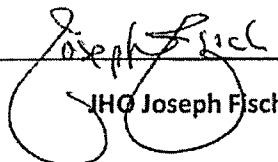
As one who has devoted over a half a century to Public Service, it is not easy to recommend the termination of employment of another Public Servant. But I cannot faithfully discharge my responsibility as Judicial Hearing Officer by failing to take notice of the portrait of respondent that emerged after the evidence presented to me.

It is a portrait, I am saddened to describe, of one who institutionalized his abdication of duty by appointing a "Deputy" to perform work he was required to do; it is a supervisor who not only appropriates money subordinates had entrusted to the "Sunshine Fund" but also income subordinates deserved by usurping their court reporting assignments, and keeping them for himself; it is a portrait of a bully who threatened subordinates and created a hostile work environment ("It is not that hard to fire somebody"); it is one who brazenly proclaimed his unqualified disdain for non-lucrative reporting work ("I don't do pro se"); a boss who flouted his authority (I'm the Chief Reporter and I can do whatever I want"); a supervisor who dishonored seniority by striking eligible staff from the assignment list and taking the assignment for himself ("I can make my money however I want to"); who when cautioned about violating parameters restricting his court reporting work, converted such abuse into license by announcing he fell within such parameters; a 20 year veteran who was confrontable in submitting statements falsely attesting to attendance when he was in fact absent.

Based upon the overwhelming evidence of multitudinous acts of misconduct, I recommend the termination of respondent's employment.

Dated:

March 15, 2019


JHO Joseph Fisch

ADDENDUM

After the case concluded, Respondent's attorney forwarded an Affidavit from John Phelps seeking to "Supplement" testimony provided at the Hearing on December 11 and 12, 2018. Nine witnesses, including Mr. Phelps, testified at such Hearing, following which both parties concluded their presentation of testimonial evidence. Post-Hearing briefs and memoranda were then submitted, followed by Oral Argument.

Mr. Phelps affidavit is rejected, but incorporated as part of the official file.